

**Majlis Agama Islam Wilayah Persekutuan v Glomac Resources
Sdn Bhd**

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL
NO W-02(NCVC)(W)-1215-07 OF 2017
ABDUL RAHMAN SEBLI, ZALEHA YUSOF AND RHODZARIAH
BUJANG JJCA
20 DECEMBER 2018

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Civil Procedure — Judgment and orders — Setting aside — Fraudulent concealment of material fact in obtaining order — Deliberate fraud practised upon court — Whether learned High Court judge erred in setting aside summary judgment on grounds of fraud, breach of natural justice or non-disclosure/concealment of material facts

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Contract — Construction — Terms — Joint venture agreement — Whether learned High Court judge erred in fact and in law in re-interpreting agreement and holding under cl 5.1 that Majlis Agama Islam only entitled to total amount of RM15.5m — Whether learned High Court judge erred in fact and in law in ordering respondent to be compensated with damages of RM1.14m with interest and cost

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A joint venture agreement ('the August agreement') was entered into between the appellant ('Majlis Agama Islam') and Leader Domain Sdn Bhd ('Leader Domain') in respect of the development of a piece of land belonging to the appellant and the project was named Galleria Hartamas. The parties had agreed in cl 5.1.1 that the appellant would receive cash payment of RM12.5m to be paid progressively and one lot of intermediate three storey shop office building ('in-kind entitlement') valued at RM3m under cl 5.1.2. Under cl 8.16 the parties agreed that one of the units belonging to Majlis Agama Islam would be converted to a surau at the total expense of Leader Domain. The building of the surau was part of the condition imposed by Datuk Bandar Kuala Lumpur in the approval for the development of the said project. Less than two months later, Leader Domain entered into another joint venture agreement ('the October agreement') with the respondent ('Glomac') wherein Glomac agreed to perform the former's obligations under the August agreement. The development of the said land was completed and Majlis Agama Islam was paid and delivered by Glomac the in-kind entitlement although no formal agreement were executed between them. What was disputed was the ground floor unit, where the surau was built, that was Unit B-G-01 ('the disputed surau unit'). An ex parte order was granted to Majlis Agama Islam against Glomac and Leader Domain for an interlocutory injunction to restrain them from

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- A dealing with the disputed surau unit. Parties then referred the dispute for arbitration and a consent judgment was entered between Leader Domain and Majlis Agama Islam where the former agreed not to deal with the disputed surau unit until the dispute had been resolved by the court. They both also agreed to set aside their rights to refer the dispute to arbitration and for Majlis Agama Islam to file an action in the High Court to seek a declaration in the High Court or other suitable remedies in respect of their dispute. Glomac's counsel was not present when that consent judgment was entered. Then, Majlis Agama Islam filed a suit in Kuala Lumpur High Court ('Suit 406') against Leader Domain to, inter alia, seek and declare that it was the legal and beneficial owner of the disputed surau unit and for Leader Domain to deliver possession of the same together with all the furnishings within one month from the court order. Majlis Agama Islam subsequently filed a summary judgment application and Nor Bee Ariffin J granted the application. The decision was appealed but dismissed. After the dismissal of that appeal, Glomac filed this suit under appeal in High Court. Glomac prayed to, inter alia, set aside the summary judgment on grounds of fraud, breach of natural justice and of its constitutional rights, that Glomac had satisfied its obligation of paying Majlis Agama Islam RM15.5m under the August agreement with one of the delivered unit to be converted into a surau at the expense of Glomac. Leader Domain and Majlis Agama Islam filed a joint defence and reiterated, inter alia, that Majlis Agama Islam was the registered and beneficial owner of the disputed surau unit, that Glomac was estopped from getting the reliefs as prayed based on the principles of estoppel and/or res judicata and the action was an abuse of the court process. It was also pleaded that there was no privity of contract between Majlis Agama Islam and Glomac. Glomac was granted, inter alia, the following prayers against Majlis Agama Islam: (i) the judgment in Suit 406 was set aside; (ii) a declaration that Majlis Agama Islam's entitlement under cl 5.1 of the August agreement was limited to the sum of RM15.5m which Glomac had satisfied; (iii) Majlis Agama Islam to pay Glomac the sum of RM1,140,000 being the value of Unit B-3-01 (the first floor unit) with interest at 5%pa; and (iv) Majlis Agama Islam remained as the registered owner of the disputed surau unit. Dissatisfied with the judgment, Majlis Agama Islam filed this appeal and Glomac cross-appealed against prayer (iii) on the compensation.
- H **Held**, dismissing the appeal and allowing the cross-appeal:
- I (1) The filing of Suit 406 action despite clear evidence of Glomac's interest in the disputed surau unit would come under what was said in *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346 as 'a deliberate fraud practised upon the court'. By adjudicating the claim to the disputed surau unit as part of Majlis Agama Islam's entitlement under the project without affording Glomac the right to be heard, there was obviously a breach of the rules of natural justice — whether Glomac's interest was a legal and valid one as claimed by them or their claim an unjust

enrichment and an abuse of the court's process was not that of Majlis Agama Islam to make but for the court to adjudicate and determine. Thus, it was satisfied that the learned High Court judge had made the right decision to set aside the said summary judgment (see para 13).

- (2) The words used in cll 5.1, 5.1.2 and 8.16 of the August agreement were indeed clear and unambiguous and spelt out the intention of the parties in the most explicit of terms. In order to ascertain if Majlis Agama Islam had received its full entitlement under the project, the value of the units it was entitled to was the most relevant and pertinent consideration. When combined with the cash payment of RM12.5m given to Majlis Agama Islam, it had received far more than the RM15.5m stipulated as its entitlement under the August agreement. The court was of the view that Majlis Agama Islam's entitlement under the project was confined to the monetary value of RM15.5m, the finding of the learned High Court judge that Majlis Agama Islam 'has no choice but to give up its claims over the disputed unit' was one that the court would echo (see paras 17–19).
- (3) The way forward would not be to de-register the disputed surau unit but to give Glomac adequate compensation for the loss of it. The compensation should be the value of the disputed surau unit which Messrs Rahim & Co had itemised at RM3.7m. There was no evidence to the contrary adduced in respect of the value of the disputed surau unit by Majlis Agama Islam. Compensation based on its value was fair because the dispute here centred on the said unit (see para 20).

[Bahasa Malaysia summary]

Perjanjian usahasama ('perjanjian Ogos') telah ditandatangani antara perayu ('Majlis Agama Islam') dan Leader Domain Sdn Bhd ('Leader Domain') berhubung dengan pembangunan sebidang tanah milik perayu dan projek ini dinamakan Galleria Hartamas. Pihak-pihak telah bersetuju dalam klausa 5.1.1 bahawa perayu akan menerima bayaran tunai sebanyak RM12.5 juta yang akan dibayar secara berperingkat dan satu lot tengah bangunan kedai pejabat tiga tingkat ('hak bukan wang') bernilai RM3 juta di bawah klausa 5.1.2. Di bawah klausa 8.16 pihak-pihak bersetuju bahawa salah satu unit milik Majlis Agama Islam akan ditukarkan kepada surau dengan jumlah perbelanjaan Leader Domain. Bangunan surau adalah sebahagian daripada syarat yang dikenakan oleh Datuk Bandar Kuala Lumpur dalam kelulusan untuk pembangunan projek tersebut. Kurang daripada dua bulan kemudian, Leader Domain memeterai perjanjian usahasama yang lain ('perjanjian Oktober') dengan responden ('Glomac') di mana Glomac bersetuju untuk melaksanakan tugas sebelumnya di bawah perjanjian Ogos. Pembangunan tanah tersebut telah selesai dan Majlis Agama Islam dibayar dan diserahkan oleh Glomac hak bukan wang walaupun tiada perjanjian formal di antara mereka. Apa yang dipertikaikan adalah unit aras bawah, di mana surau itu dibina, iaitu Unit

- A B-G-01 ('unit surau yang dipertikaikan'). Satu perintah ex parte telah diberikan kepada Majlis Agama Islam terhadap Glomac dan Leader Domain untuk injuksi interlokutori untuk menghalang mereka daripada berurusan dengan unit surau yang dipertikaikan. Pihak-pihak kemudiannya merujuk pertikaian untuk timbang tara dan penghakiman persetujuan telah
- B dimasukkan antara Leader Domain dan Majlis Agama Islam di mana Leader Domain bersetuju untuk tidak berurusan dengan unit surau yang dipertikaikan sehingga pertikaian itu telah diselesaikan oleh mahkamah. Kedua-duanya juga bersetuju untuk mengetepikan hak mereka untuk merujuk pertikaian tersebut kepada timbang tara dan untuk Majlis Agama Islam untuk
- C memfailkan tindakan di Mahkamah Tinggi untuk mendapatkan pengisytiharan di Mahkamah Tinggi atau remedi lain yang sesuai berkenaan dengan pertikaian mereka. Peguam Glomac tidak hadir ketika penghakiman persetujuan itu dimasukkan. Kemudian, Majlis Agama Islam memfailkan guaman di Mahkamah Tinggi Kuala Lumpur ('Guaman 406') terhadap Leader
- D Domain untuk, antara lain, memohon dan mengisytiharkan bahawa ia adalah pemilik sah dan berkepentingan unit surau yang dipertikaikan dan bagi Leader Domain untuk menyerahkan pemilikan yang sama dengan semua perabot dalam masa satu bulan dari perintah mahkamah. Majlis Agama Islam
- E kemudian memfailkan permohonan penghakiman terus dan Yang Arif Nor Bee Ariffin memberikan permohonan itu. Keputusan tersebut dirayu tetapi ditolak. Selepas penolakan rayuan tersebut, Glomac memfailkan guaman ini di bawah rayuan di Mahkamah Tinggi. Glomac memohon untuk, antara lain, mengetepikan penghakiman terus atas dasar penipuan, pelanggaran keadilan semulajadi dan hak perlembagaannya, bahawa Glomac telah memenuhi
- F kewajiban membayar Majlis Agama Islam RM15.5 juta di bawah perjanjian Ogos dengan salah satu unit yang disampaikan untuk ditukar menjadi surau dengan perbelanjaan Glomac. Leader Domain dan Majlis Agama Islam memfailkan pembelaan bersama dan mengulangi, antara lain, bahawa Majlis
- G Agama Islam adalah pemilik berdaftar dan berkepentingan unit surau yang dipertikaikan, bahawa Glomac telah diestop daripada mendapatkan relif yang dimohon berdasarkan prinsip estoppel dan/atau res judicata dan tindakan itu adalah penyalahgunaan proses mahkamah. Adalah juga diplidkan bahawa tiada kontrak yang sah antara Majlis Agama Islam dan Glomac. Glomac telah
- H diberikan, antara lain, permohonan berikut terhadap Majlis Agama Islam: (i) penghakiman dalam Guaman 406 telah diketepikan; (ii) perisytiharan bahawa kelayakan Majlis Agama Islam di bawah klausa 5.1 perjanjian Ogos dihadkan kepada jumlah RM15.5 juta yang mana Glomac telah tunaikan; (iii) Majlis Agama Islam membayar Glomac sejumlah RM1,140,000 sebagai
- I nilai Unit B-3-01 (unit aras pertama) dengan faedah pada 5% setahun; dan (iv) Majlis Agama Islam kekal sebagai pemilik berdaftar unit surau yang dipertikaikan. Tidak berpuas hati dengan penghakiman tersebut, Majlis Agama Islam memfailkan rayuan ini dan Glomac merayu terhadap permohonan (iii) atas pampasan tersebut.

Diputuskan, menolak rayuan dan membenarkan rayuan balas:

- (1) Pemfailan tindakan Guaman 406 walaupun keterangan yang jelas tentang kepentingan Glomac dalam unit surau yang dipertikaikan akan datang dengan apa yang dikatakan dalam *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346 sebagai 'penipuan sengaja yang dilakukan terhadap Mahkamah'. Dengan memutuskan tuntutan ke atas unit surau yang dipertikaikan sebagai sebahagian daripada hak Majlis Agama Islam di bawah projek itu tanpa memberikan Glomac hak untuk didengar, jelas ada pelanggaran peraturan keadilan semulajadi — sama ada kepentingan Glomac adalah sah sebagaimana yang didakwa oleh mereka atau tuntutan mereka adalah satu pengayaan tidak adil dan penyalahgunaan proses mahkamah bukanlah yang dilakukan oleh Majlis Agama Islam melainkan bagi mahkamah untuk memutuskan dan menentukan. Oleh itu, adalah memuaskan bahawa hakim Mahkamah Tinggi yang bijaksana telah membuat keputusan yang tepat untuk mengetepikan penghakiman terus tersebut (lihat perenggan 13).
- (2) Kata-kata yang digunakan dalam klausa 5.1, 5.1.2 dan 8.16 dari perjanjian Ogos adalah nyata dan jelas dan menyatakan niat pihak-pihak dalam istilah yang paling jelas. Untuk memastikan jika Majlis Agama Islam telah menerima hak sepenuhnya di bawah projek itu, nilai unit yang berhak yang menjadi pertimbangan adalah paling relevan dan penting. Apabila digabungkan dengan bayaran tunai RM12.5 juta yang diberikan kepada Majlis Agama Islam, ia telah menerima lebih banyak daripada RM15.5 juta yang ditetapkan sebagai kelayakannya di bawah perjanjian Ogos. Mahkamah berpendapat bahawa hak Majlis Agama Islam di bawah projek itu terhad kepada nilai wang sebanyak RM15.5 juta, dapatan hakim Mahkamah Tinggi yang bijaksana bahawa Majlis Agama Islam 'tidak mempunyai pilihan melainkan untuk melepaskan tuntutan terhadap unit yang dipertikaikan' adalah salah satu yang mahkamah akan ulangi (lihat perenggan 17–19).
- (3) Tindakan kehadapan tidak untuk membuang pendaftaran unit surau yang dipertikaikan tetapi untuk memberi pampasan yang cukup untuk Glomac untuk kehilangannya. Pampasan itu haruslah nilai unit surau yang dipertikaikan oleh Tetuan Rahim & Co telah senaraikan pada RM3.7 juta. Tiada keterangan yang membuktikan sebaliknya mengenai nilai unit surau yang dipertikaikan oleh Majlis Agama Islam. Pampasan berdasarkan nilainya adalah adil kerana pertikaian di sini berpusat pada unit tersebut (lihat perenggan 20).]

Notes

For cases on setting aside, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5784–5856.

- A For cases on terms, see 3(4) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 4629–4632.

Cases referred to

- B *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393, FC (refd)
Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346, CA (refd)
Choong Howei v Cheah Choo Eng & Ors and another appeal [2015] 6 MLJ 95, CA (folld)
C *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622, FC (refd)
Lin Kai Wing & Anor v Lin Kai Lam & Ors [2016] 4 MLJ 372, CA (refd)

Legislation referred to

- D Limitation Act 1953 s 29

Appeal from: Civil Suit No 22NCVC-364–07 of 2015 (High Court, Kuala Lumpur)

- E *Nizam Bashir (Zulkifli Che Yong with him) (Zulkifli Yong Azmi & Co) for the appellant.*
Siew Choon Jern (Lee Kwee Yock with her) (Douglas Yee) for the respondent.

Rhodzariah Bujang JCA:

- F BRIEF FACTS OF THE CASE

- [1] The starting point in the dispute between the parties in this appeal was a joint venture agreement dated 25 August 2004 ('the August agreement') entered into between the appellant, Majlis Agama Islam Wilayah Persekutuan ('Majlis Agama Islam' for short who was the first defendant in the High Court) and Leader Domain Sdn Bhd ('Leader Domain' for short who was the second defendant in the High Court and not a party in this appeal). The August agreement was in respect of the development of a piece of land belonging to the appellant and the project was named Galleria Hartamas. Under the August agreement, the parties have agreed in cl 5.1.1 that the appellant would receive cash payment of RM12.5m to be paid progressively and one lot of intermediate three storey shop office building ('in-kind entitlement') valued at RM3m under cl 5.1.2. Under cl 8.16 the parties agreed that one of the units belonging to Majlis Agama Islam would be converted to a surau at the total expense of
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- Leader Domain. The building of the surau was part of the condition imposed by Datuk Bandar Kuala Lumpur in the approval for the development of the said project. However less than two months later, on 8 October 2004, Leader Domain entered into another joint venture agreement ('the October agreement') with Glomac Resources Sdn Bhd ('Glomac') wherein Glomac

agreed to perform the former's obligations under the August agreement. The development of the said land was completed and it was not disputed that Majlis Agama Islam was paid by Glomac the agreed cash consideration of RM12.5m or that on 21 February 2012 vacant possession of three units consisting of the first, second and third of the shop lot were delivered by Glomac to Majlis Agama Islam although no formal agreement were executed between them. This was because parties proceeded with and the official documentation to the relevant authorities were all made in Glomac's name as the developer. What was disputed was the ground floor unit, where the surau was built, that is Unit B-G-01 ('the disputed surau unit') and this was the subject matter of not just the decision of the High Court in this appeal before us but also two earlier court actions filed by Majlis Agama Islam against both the developers, separately and conjointly.

THE COURT ACTIONS

[2] On 15 February 2013, Majlis Agama Islam filed an originating summons against Glomac and Leader Domain for an interlocutory injunction to restrain them from dealing with the property, in particular the disputed surau unit until the dispute in relation thereto has been determined by arbitration and/or until further order of the court. An ex parte order was granted on 19 February 2013 and at the inter-partes hearing both Glomac and Leader Domain were represented by counsel. Parties then proceeded to take steps to refer the dispute for arbitration but subsequently and for reasons not material to the issue at hand in this appeal, a consent judgment was entered between Leader Domain and Majlis Agama Islam where Leader Domain agreed not to deal with the disputed surau unit until the dispute between Majlis Agama Islam and Leader Domain on the said unit has been resolved by the court. They both also agreed to set aside their rights to refer the dispute to arbitration and for Majlis Agama Islam to file an action in the High Court to seek a declaration in the High Court or other suitable remedies in respect of their dispute. It is to be noted that Glomac's counsel was not present when that consent judgment was entered and his absence was clearly recorded in the court order (p 889 of the appeal record).

[3] Then on 24 June 2013 Majlis Agama Islam filed a suit in Kuala Lumpur High Court (Suit No 22 NCCVC-406-06 of 2013 and hereinafter referred to as Suit 406) against Leader Domain to, inter alia, seek and declare that it was the legal and beneficial owner of the disputed surau unit and for Leader Domain to deliver possession of the same together with all the furnishings within 1 month from the court order. Majlis Agama Islam subsequently filed a summary judgment application on 7 November 2013 and on 30 April 2014 Nor Bee Ariffin J granted the application. That decision went up on appeal to this court, which appeal was dismissed. Seven months 13 days after the dismissal of that appeal, Glomac filed this suit under appeal (Suit No 22

- A** NCVC-364–07 of 2015) in the same High Court. In that suit, Glomac prayed to, inter alia, set aside the summary judgment on grounds of fraud, breach of natural justice and of its constitutional rights, that Glomac had satisfied its obligation of paying Majlis Agama Islam RM15.5m under the August agreement with one of the delivered unit to be converted into a surau at the expense of Glomac. In other words, the disputed surau unit was theirs.
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- C** [4] This suit was heard before S Nantha Balan J and it was heavily contested by Leader Domain and Majlis Agama Islam who filed a joint defence and reiterated, inter alia, that Majlis Agama Islam was the registered and beneficial owner of the disputed surau unit, that Glomac was estopped from getting the reliefs as prayed based on the principles of estoppel and/or res judicata and the action is an abuse of the court process. It was also pleaded that there was no privity of contract between Majlis Agama Islam and Glomac. This action went for full trial and despite the joint statement of defence filed, only Majlis Agama Islam participated at the trial. In a judgment dated 25 May 2017, Glomac was granted, inter alia, the following prayers against Majlis Agama Islam:
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- (i) the judgment of Nor Bee Ariffin J in Suit 406 was set aside;
- E** (ii) it was declared that Majlis Agama Islam's entitlement under cl 5.1 of the August agreement is limited to the sum of RM15.5m which Glomac has satisfied;
- (iii) Majlis Agama Islam to pay Glomac the sum of RM1,140,000 being the value of Unit B-3-01 (the first floor unit) with interest at 5%pa from 7 July 2015 until the date of full payment or realisation;
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- (iv) notwithstanding prayer (i) above, Majlis Agama Islam remained as the registered owner of Unit B-G-01, that is the disputed surau unit; and
- G** (v) Majlis Agama Islam to pay cost of RM50,000 subject to allocatur.

- H** [5] Dissatisfied with the judgment, Majlis Agama Islam filed this present appeal before us and Glomac cross-appealed against prayer (iii) on the compensation. After hearing submissions from their respective counsel, we dismissed the appeal and allowed that of the cross-appeal by increasing the compensation to RM3.7m with a global cost of RM40,000 to Glomac. Our reasons for ordering so are stated below but first it would be fair to give a summary of S Nantha Balan J's grounds of judgment in so far as the issues raised in this appeal are concerned. The said three issues as defined by learned counsel for Majlis Agama Islam in their written submission are:
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- (a) whether the learned High Court judge erred in setting aside Nor Bee Ariffin J's judgment on the grounds of fraud, breach of natural justice or non-disclosure/concealment of material facts;

- (b) whether the learned High Court judge erred in fact and in law in re-interpreting the August agreement and holding under cl 5.1 that Majlis Agama Islam was only entitled to a total amount of RM15.5m; and A
- (c) whether the learned High Court judge erred in fact and in law in ordering Glomac to be compensated with damages of RM1.14m with interest and cost. B

THE HIGH COURT JUDGMENT

First issue: Settling aside the earlier judgment of Nor Bee Ariffin J C

[6] The learned High Court judge, after considering the factual matrix of the case, evidence of witnesses, contemporaneous documentary evidence, the circumstances and probabilities of the case found that there was a firm and unequivocal understanding and a tacit, if not an express understanding or agreement, between Glomac and Majlis Agama Islam that Glomac will not deal with the disputed surau unit until the entitlement to that unit was resolved by the court in a court action to be initiated by Majlis Agama Islam. Majlis Agama Islam knew that Glomac would put up a strong opposition to their claim in Suit 406 as admitted by their witness, Encik Wan Mohd Sanusi bin Mohd Noor (DW2) at the trial and thus did so without their knowledge. It was probable, said His Lordship that if Glomac was a party in Suit 406, summary judgment would not have been entered. At the trial Glomac adduced evidence to show that they only discovered the existence of Suit 406 when they offered to sell the disputed surau unit to Majlis Agama Islam vide a letter dated 19 May 2014 which the former replied vide a letter dated 17 July 2014 to say that the High Court had declared that the disputed surau unit belonged to them. Glomac was also informed that the decision was on appeal and that the Court of Appeal would be delivering its decision on 22 July 2014 although the truth was the appeal was only heard and decided by the Court of Appeal on 24 November 2014, which was four months later. D
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[7] In fairness to Majlis Agama Islam and as reproduced in para 47 of the judgment of the learned High Court judge, Majlis Agama Islam's witness DW2 did explain why Glomac was not joined as a co-defendant in Suit 406. He listed out six reasons for the non-joinder, one of which was that Glomac through the conduct of its counsel was not interested to be involved in the dispute. Therefore, said the witness, given the dispute was between Majlis Agama Islam and Leader Domain and that Glomac was just Leader Domain's agent and/or representative, it was not made a party in Suit 406. This drew a specific comment from the learned High Court judge who said that the contemporaneous correspondence does not support such a contention and the fact is that Majlis Agama Islam filed the originating summons against Glomac, H
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A then wrote to it on 18 April 2013 asking Glomac to waive the arbitration and bring the dispute to court which Glomac's solicitor by letter dated 26 April 2013 agreed and Glomac's undertaking provided at Majlis Agama Islam's request not to deal with the disputed surau unit until the resolution of the dispute by the civil court. The learned High Court judge rejected Majlis Agama Islam's contention that Glomac was not made a party in Suit 406 because they had no contractual relationship with it. As for the appeal in the Court of Appeal of Suit 406, the learned High Court judge acknowledged that Glomac could have been allowed to intervene in the appeal but given that summary judgment had been entered there was no action pending in the High Court, such an intervention may not be allowed following the Federal Court case of *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622. Further, said His Lordship, being aware of Glomac's interest in the disputed unit, and yet excluding them from Suit 406 it does not lie in Majlis Agama Islam's mouth to suggest that Glomac should have intervened in the appeal. His Lordship therefore concluded that there was a blatant breach of the basic rules of natural justice and concealment of material facts for which the order of Nor Bee Ariffin J in Suit 406 must be set aside.

E *Secind issue: Interpretation of section 5.1*

[8] The provisions on Majlis Agama Islam's entitlements under the August agreement are sections 5.1, 5.1.1 and 5.1.2 but the relevant ones for this appeal are only the first and the last sections which are reproduced below:

F ARTICLE V
ENTITLEMENT
SECTION 5.1 MAIWP'S ENTITLEMENT

G In consideration of the mutual covenants agreements undertakings and obligations of the parties hereto and in further consideration of MAIWP agreeing to enter into this Agreement the parties hereto hereby mutually agree that MAIWP shall receive a total guaranteed return amounting to the sum of Ringgit Malaysia Fifteen Million Five Hundred Thousand (RM15,500,000.00) only which amount is based on the value of the Land as agreed by the parties hereto (hereinafter referred to as 'the Cash Payment') together with One (1) Lot of shop-office (intermediate unit) comprises at least Three (3) Storey Shop Office buildings to valued for the sum not less than Ringgit Malaysia Three Million (RM3,000,000.00) only (hereinafter defined as 'in kind entitlement') (the cash payment and in kind entitlement hereinafter collectively referred to as 'MAIWP's Entitlement') and MAIWP's Entitlement shall be satisfied in the following manner:-

I 5.1.2 IN KIND ENTITLEMENT

The Company shall allocate one (1) unit of shop offices comprises at least Three Storey building to be valued for an amount not less than Ringgit Malaysia Three

Million (RM3,000,000.00) only and in the event that the sale price of the said unit less that the above value the Company shall pay the differences in cash to MAIWP. A

The learned High Court judge at para 77 of his grounds of judgment which we now paraphrased, asked this pertinent question, which is whether upon the interpretation of the above sections or clauses and taking into account Glomac's conduct of conveying the delivered units (which had the combined value of RM4.3m) to Majlis Agama Islam, Glomac had fulfilled its 'in kind obligation' under the August agreement. After due consideration of both the oral and documentary evidence, His Lordship held in para 112 of his grounds of judgment that: B C

... Quite clearly there is nothing in cl 5.1 or 5.1.2 of JVA1 which entitles D1 to any additional floors as a 'bonus'. At the same time, I am also cognizant that these clauses do not provide for D1 to pay for any 'excess' if the value of what is given to them (in cash and in kind) is more than RM15.5m. And so boils down to what is it that makes business sense. In my view, upon a proper construction of cll 5.1 and 5.1.2 of JVA1, what was in fact intended, is that D1 is to receive cash and 'in kind' entitlement in the total sum of RM15.5m. D

Then in para 126 of his grounds of judgment, the learned High Court judge held as follows: E

126. As such, since a cash sum of RM12.5m was paid by the plaintiff to D1 and the delivered units have a combined value of RM4.3m, the plaintiff has fulfilled its obligations as per cll 5.1 and 5.1.2 of JVA1. I am therefore of the view that the disputed unit cannot be and is not part of D1's 'in-kind' entitlement under JVA1. F

The learned High Court judge noted in the next para 127 of the judgment that at the time of the trial both the delivered units and the disputed surau unit had all been registered in the name of the first defendant and that it would be cumbersome and rather problematic to set aside the registered ownership of the disputed unit and therefore the appropriate relief for the plaintiff would be a compensation for the loss of that unit. G

Third issue: Compensation to Glomac of RM1,140,000 H

[9] On this issue, the reasoning of the learned High Court judge in arriving at the amount of compensation is stated in para 132 of the judgment which reads: I

132. Hence, if the plaintiff had say, delivered the disputed unit and Unit B-1-01 and Unit B-2-01, then ownership of Unit B-03-01 (valued at RM1.14m) would remain with the plaintiff. In a sense, the plaintiff too must accept some responsibility for this debacle. In the result, I was of the view that the most fairest and equitable

- A outcome would be to compel D1 to pay compensation to the plaintiff based on the market value for Unit B-3-01 (RM1.14m). I therefore ordered D1 to pay this sum as compensation to the plaintiff.

THE APPEAL

- B [10] As was orally appraised before us at the hearing of the appeal by learned counsel for Majlis Agama Islam, the primary issue to resolve both the appeals was whether Majlis Agama Islam was entitled to all the four units claimed by them in this action, that is, the three delivered units and the disputed *surau* unit.
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However, before going into the merits of that issue the most pressing one which must first be determined was the setting aside of Nor Bee Ariffin J's judgment.

- D SETTING ASIDE OF THE SUMMARY JUDGMENT

- [11] As stated earlier the grounds relied upon by Glomac to set aside the said judgment were fraud, denial of the fundamental rights to be heard and/or contravention of its constitutional rights, unjust enrichment and abuse of court process. Learned counsel for Majlis Agama Islam submitted that fraud could not be relied upon because no police report was lodged by Glomac against it and cited the case of *Lin Kai Wing & Anor v Lin Kai Lam & Ors* [2016] 4 MLJ 372. With respect, the application of the ratio in that case would be solely misplaced here partnership given by the appellant and recovery of the same by one of its partners, the respondent. Obviously there was a criminal element to it and the court was also confronted with the issue of limitation for fraud under s 29 of the Limitation Act 1953. In this case before us, the material concealment was in not informing or bringing Glomac as a party to Suit 406 despite clear evidence, as stated by the learned High Court judge of its interest in the said unit as detailed earlier. Thus, as rightly submitted by learned counsel for the Glomac, given that summary judgment has been entered and there existed only a small window of opportunity to intervene in the appeal against that decision, the filing of this suit was the better option although admittedly it was filed not soon after that decision by this court.
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- [12] We say that it was the right legal path to pursue because of the strength of case authorities which decided that it was so. The Federal Court in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 at p 409 of the report says this and which is quoted below in extensio:
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It is of course settled law as laid down by the Federal Court in *Hock Hua Bank's* case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule (which was not in issue and therefore not discussed in *Hock Hua Bank*) is where the final judgment of the High Court could be proved to be null and void on ground of

illegality or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court ‘... which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make’.

The Privy Council through Lord Diplock also emphasised that the courts in England have not closed the door as to the type of defects in the final judgment of the court that can be brought into the category that attracts ex debito justitiae the right to have it set aside without going into the appeal procedure, ‘save that specifically it includes orders that have been obtained in breach of rules of natural justice’. Similarly in this country, the statement of Abdoocader J (as he then was) in *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37 at p 39 provides the correct guideline on the subject:

The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings. Before any court or tribunal and whenever it is relied upon — in other words, it is subject to collateral attack. In collateral proceedings, the court may declare an act that purports to bind to be non-existent. In *Harkness v Bells’ Asbestos and Engineering Ltd* [1967] 2 QB 729, Lord Diplock LJ (now a Law Lord) said (at p 736) that ‘it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside.

For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court ex debito justitiae to a category of cases involving orders which contravened ‘any written law’, the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

[13] Further, we must also be consistent with this court’s decision in *Choong Howe v Cheah Choo Eng & Ors and another appeal* [2015] 6 MLJ 95 where it was held that on the ground of fraudulent concealment of a material fact the respondents in that case should have filed a separate court action to impugn the order obtained against them. Such a concealment, held this court, constitutes

- A an exception to the general rule as stated by Mohd Azmi FCJ in *Badiaddin's* case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. In our view the filing of Suit 406 action despite clear evidence of Glomac's interest in the disputed unit would come under what was said in *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346 as '*a deliberate fraud practised upon the court*'. The fact that this court had affirmed the said summary judgment is of no legal consequence because this court was, as did Nor Bee Ariffin J, totally unaware of Glomac's interest in the disputed *surau* unit. For clarity, we reiterate that the material concealment here was the said interest of Glomac's in the disputed *surau* unit. By adjudicating the claim to that unit as part of their entitlement under the project without affording Glomac the right to be heard, there was obviously a breach of the rules of natural justice — whether Glomac's interest was a legal and valid one as claimed by them or their claim an unjust enrichment and an abuse of the court's process was not that of Majlis Agama Islam to make but for the court to adjudicate and determine. For these reasons, we were satisfied that the learned High Court judge had made the right decision to set aside the said summary judgment.

E ENTITLEMENT OF MAJLIS AGAMA ISLAM UNDER CLAUSE 5.1 OF THE AUGUST AGREEMENT

[14] This cll 5.1 and 51.2 must not be read in isolation but with cl 8.16 which provides as follows:

F SECTION 8.16 PRAYER PLACE FOR MUSLIM

For the purpose of the Muslim to pray or to conduct Islamic religious activities the Company shall provide a necessary fittings and equipment for the establishment of a prayer place Muslims to perform their religious duties to one of the unit provided by MAIWP. One of the unit belonging to MAIWP shall be converted to *surau* whereby the Company shall bear all costs for the establishment for the above prayer place including the costs of renovation.

- G The learned High Court Judge in his grounds of judgment at paragraph 76 referred to the Federal Court's case of *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464 which learned counsel for Glomac had also included in their Bundle of Authorities before us where Zainun FCJ had exhaustively laid down the guidelines for interpretation of a contract but what is a pertinent reminder relevant to this case is paragraph 27 of the said judgment, in particular the sub-paragraphs which have been highlighted below:

- H [27] In recent times, the restatement of principles in the landmark case of *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, at pp 912–913 ('ICS') provides a helpful starting point for the consideration of the relevant principles. The judgment of Lord Hoffmann is as reproduced below, where His Lordship stated that:

I ... I do not think that the fundamental change which has overtaken this branch

of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v Simmonds* [1971] 1 WLR 1381, 1384–1386 and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989, is always sufficiently appreciated.

The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of ‘legal’ interpretation has been discarded. The principles may be summarised as follows:

- (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
- (2) The background was famously referred to by Lord Wilberforce as the ‘matrix of fact’, but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
- (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
- (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *MANNAI Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1995] 1 WLR 1 508.
- (5) The ‘rule’ that words should be given their ‘natural and ordinary meaning’ reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an

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A *intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Compania Naviera SA v Salen Rederierna AB [1985] AC 191, 201:*

B *If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to conclusion that flouts business common sense, it must be made to yield to business common sense (Emphasis added.)*

Then in paragraphs 51 to 53 Her Ladyship states as follows:

C [51] *Thus in addition to the above in interpreting the contract, the court must approach it holistically. No term is to be taken or interpreted in isolation. This canon of construction is so long established, it is almost banal. See for instance Chamber Colliery Ltd v Twyerould [1915] 1 Ch 268:*

D ... the application of the well-known (sic) rule that a deed ought to be read as a whole, in order to ascertain the true meaning of its several clauses; and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed, if that interpretation does no violence to the meaning of which they are naturally susceptible.

E [52] *This is further reinforced by Lord Mustill in Charter Reinsurance Co Ltd v Fagan [1997] AC 313, 384, where His Lordship stated that the words (to be interpreted) must be set in the landscape of the instrument as a whole’.*

[53] In *Re Sigma Finance Corporation* [2010] 1 All ER 571, Lord Mance said:

F In my opinion, the conclusion reached below attaches too much weight to what the courts perceived as the natural meaning of the words ... and too little weight to the context in which the sentence appears and to the scheme ... as a whole. Lord Neuberger was right to observe that the resolution of an issue of interpretation in a case like the present is an iterative process, involving ‘checking each of the rival meanings against other provisions of the document and investigating its commercial consequences ...

G ... Like him, I also think that caution is appropriate about the weight capable of being placed on the consideration that this was a long and carefully drafted document, containing sentences or phrases which it can, with hindsight, be seen could have been made clearer had the meaning now sought to be attached to them been specifically in mind ...

H ... Even the most skilled drafters sometimes fail to see the wood for the trees, and the majority below acknowledged ... Of much great importance in my view, in the ascertainment of the meaning that the Deed would convey to a reasonable person with the relevant background knowledge, is an understanding of its overall scheme and a reading of its individual sentences and phrases which places them in the context of that overall scheme. (Emphasis added.)

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[15] Against the backdrop of these legal principles and the relevant clauses of the August agreement as reproduced above, the evidence of Glomac's Senior Project Manager, Kamal Zairuddin Shah bin Omardin (PW1) at pp 331–332 Vol 2A of the appeal record must also be considered. This evidence reads:

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Q: Now given the amended approved Building Plan presently before the Court, can the Plaintiff build the Surau at any other place other than the ground floor and the mezzanine floor?

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A: No.

Q: Did the Plaintiff install fixtures and fittings for a Surau on the ground floor and the mezzanine floor as per the Amended Building Plan?

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A: Yes.

Q: So I put to you that even going by the Amended Building Plan, the Plaintiff themselves confirm that the ground and mezzanine floor was always intended to be a Surau and it belongs to MAIWP, agree?

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A: Yes.

Q: Can I take you to page 25 of Bundle B6. Encik Kamal, I refer you to specifically to Section [8.16], can you kindly read that portion out, can you kindly read the second sentence out for this Court?

A: 'One of the unit belonging to MAIWP shall be converted to Surau whereby the Company shall bear all costs for the establishment for the above prayer place including the costs of renovation'.

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Court: Sorry, what page again?

DC: Page 25, Bundle B6, Section [8.16], second sentence.

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Q: Encik Kamal, do you agree that the fixtures and fittings to the extent that was installed by the Second Defendant or Plaintiff was installed pursuant to its obligation contained in that portion of the Clause?

A: Yes.

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[16] The learned High Court judge had also alluded in paras 83–84 of his judgment the evidence of DW1 (Mohd Hanif bin Salim) who was at the material time, the Ketua Unit Urus Setia, Bahagian Khidmat Pengurusan of Majlis Agama Islam who conceded that Majlis Agama Islam's entitlement was based on the value of the land which was agreed at RM15.5m and that if the project was not a success it would be entitled to compensation in the same exact sum. His Lordship agreed with the submission of Glomac's counsel that to concede to Majlis Agama Islam's contention that '.... anything above three storeys becomes a bonus is an opportunistic interpretation, absurd and abhorrent to business common sense' because said His Lordship, 'The corresponding business common sense interpretation of clauses 5.1.1 and 5.1.2 of JVA-1 was simply to arrive as near as possible to this value of RM15,500,000.00 giving D1 at least 3 storeys'.

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A OUR DECISION

- B** [17] When we examined the said cll 5.1, 5.1.2 and 8.16 against the legal principles on interpretation of the contract as reproduced earlier, we simply could not find any fault with the findings and conclusion made by the learned High Court judge as stated above as well as that which had been summarised in the earlier part of this judgment. The words used in the aforesaid clauses are indeed clear and unambiguous and spell out the intention of the parties in the most explicit of terms. At the risk of repetition, the overall monetary value of
- C** Majlis Agama Islam's entitlement under the project as provided in the August agreement was RM15.5m which comprises of cash of RM12.5m, one lot of at least a three storey intermediate 'Shop/office' building with a value of RM3m and a surau to be constructed from one unit of the in-kind entitlement. In
- D** order to ascertain if Majlis Agama Islam had received its full entitlement under the project, the value of the units it was entitled to is the most relevant and pertinent consideration.

THE VALUATION REPORTS

- E** [18] Both Glomac and Majlis Agama Islam produced their own valuation reports. Glomac's report by Messrs Rahim & Co (at pp 1862–1877 appeal record Vol 2D) valued the whole four storey building at RM8m whereas that of Majlis Agama Islam by Jabatan Penilaian dan Perkhidmatan Harta Wilayah Persekutuan, Kuala Lumpur (at pp 1887–1931 of the same appeal record)
- F** valued the same at a slightly lower figure of RM7,875,000. The valuation by the said department did not give a breakdown of the value of each unit but that of Messrs Rahim & Co did and it is as follows:

G	Unit No	Market Value
	B-G-01	RM3,700,000
	B-1-01	RM1,700,000
	B-3-01	RM1,140,000
	Total	RM8,00,000

- H** The failure to give the breakdown was raised by learned counsel for Glomac and quoted by the learned High Court judge at para 95 of the judgment. Likewise, the presence of it in Messrs Rahim & Co's valuation report was also mentioned by His Lordship but at para 97 of the judgment. Regardless of the relatively slight difference between the two or that the learned High Court
- I** judge rejected that produced by Majlis Agama Islam as being flawed (see para 110 of the grounds of judgment), the undisputed fact which emerged from these evidence is that when combined with the cash payment of RM12.5m given to Majlis Agama Islam, it had received far more than the RM15.5m stipulated as its entitlement under the August agreement.

[19] On this note, it is pertinent to re-state the learned High Court judge's findings which we also concurred with in respect of the two letters written by Leader Domain to Majlis Agama Islam dated 23 March 2009 and that written by the former to the latter dated 25 March 2009, both of which were copied to Glomac and in which the disputed *surau* unit was mentioned as part of Majlis Agama Islam's in-kind entitlement. Glomac did not respond to these letters but the learned High Court judge accepted the explanation of Glomac that this was because at the time the letters were written, valuation of the units have yet to be made. Given that we were of the like view as expressed earlier that Majlis Agama Islam's entitlement under the project was confined to the monetary value of RM15.5m, the ultimate finding of the learned High Court judge that Majlis Agama Islam 'has no choice but to give up its claims over the disputed unit' is one that we would echo. Accordingly, the appeal of Majlis Agama Islam was dismissed and the decision of the learned High Court judge was affirmed with cost.

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THE AWARD OF COMPENSATION

[20] Again we wish to emphasise the undisputed evidence that it was Datuk Bandar Kuala Lumpur who directed that the *surau* be located at the ground floor that is Unit B-G-01 as part of its approval for the project and that all four units have been registered in Majlis Agama Islam's name. We too were of the like mind as the learned High Court judge that the way forward would not be to de-register the disputed *surau* unit but to give Glomac adequate compensation for the loss of it. However, with respect we do not agree with His Lordship that the market value of the first floor unit (B-3-01), that is RM1,140,000 should be used as the basis for the award. This is because, as just mentioned above the location of the *surau* at the ground floor unit was in strict compliance with Datuk Bandar Kuala Lumpur's development order. It was not the wishes of either party or more importantly it was not a concession made by Glomac that the *surau* be located there at the ground floor unit. As stated by PW1 to a question posed to him in cross-examination (at p 331 of appeal record Vol 2A), Glomac cannot build the *surau* at any other place other than the ground floor and the mezzanine floor. In other words, it was *fait accompli*. Learned counsel for Glomac submitted to us that the compensation should be the value of the disputed *surau* unit which Messrs Rahim & Co had itemised at RM3.7m. For the record, there was no evidence to the contrary adduced in respect of the value of the disputed *surau* unit by Majlis Agama Islam. Compensation based on its value was to us fair because the dispute here centers on the said unit. For these reasons, the cross appeal by Glomac was allowed with cost.

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Appeal dismissed and cross-appeal allowed.

Reported by Ahmad Ismail Illman Mohd Razali